IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 359 of 1996

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

DINESHBHAI MAGANBHAI PATEL & Anr.

Appearance:

1. Criminal Appeal No. 359 of 1996

MR SUDHANSU S PATEL, ADDL.PUBLIC PROSECUTOR for Appellant.

MS KIRAN PANDE for MR BS PATEL for Respondents

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL

Date of decision: 09/07/2004

ORAL JUDGEMENT

Instant appeal filed under Section 378 of the Code of Criminal Procedure, 1973, is directed against judgment dated December 29, 1995, rendered by the learned

Chief Judicial Magistrate, Bharuch, by which the respondents are acquitted of the offences punishable under Sections 7 & 16 of the Prevention of Food Adulteration Act, 1954.

2. In the year 1993, Mr.Jamilbhai Gafarbhai Mithavala was discharging duties as Food Inspector. He had visited Shivam Dugdhalay situated in Shiv Shopping Centre at Bharuch on August 24, 1993. He had introduced himself to respondent No.1 and informed him about his intention to purchase sample of milk for analysis. He had called Shah Diptesh Kishorchandra to be present at the time of taking sample, and was also accompanied by his helper Mr.R.P.Rana. At the shop, respondent No.2, who was owner of Shivam Dugdhalay, was not present, but, his authorised agent i.e. respondent No.1 was present. The Food Inspector had given written notice as required by Section 11 of the Prevention of Food Adulteration Act, 1954 ("the Act" for short) intimating the respondent No.1 that he was desirous to purchase sample of milk for analysis. The respondent No.1 had kept a galvanized Can in the shop. The quantity of milk in the container was about 10 litres. The Food Inspector had purchased 750 millilitres of milk and paid price of Rs.6.00 to the respondent No.1 for which the respondent No.1 had issued a receipt. The sample of milk was thereafter divided into three parts and put in three different dry and clean bottles. Each bottle was marked, sealed and fastened as required by law. The Food Inspector had also obtained signature of the respondent No.1, from whom the sample was taken, on the bottles, and prepared a panchnama. One of the sample-bottles was thereafter sent to public analyst for analysis; whereas two other bottles were sent to the Local Health Authority for the purposes of sub-section(2) of Section 13 of the Act. The sample sent to the public analyst was analysed and the report indicated that milk-fat present in the sample was 3.9%, though it was required by law that minimum percentage of milk-fat should be 4.5%. In view of the result of analysis, it was mentioned in the report of the public analyst that the sample was not conforming to the standards prescribed under the Prevention of Food Adulteration Rules, 1955 ("the Rules" for short). The Food Inspector had thereafter applied for written consent of the competent authority in order to enable him to launch prosecution against the respondents. On grant of sanction, the Food Inspector had filed complaint in the Court of learned Chief Judicial Magistrate, Bharuch, and prayed the learned Magistrate to convict the respondents of the offences punishable under Sections 7 & 16 of the Act. The complaint filed by the Food Inspector was

ordered to be registered by the learned Chief Judicial Magistrate, Bharuch and summonses were issued to the respondents. In view of direction to register complaint of Food Inspector, complaint of Food Inspector was registered and numbered as Criminal Case No.31238 of 1993. After service of summonses, the respondents had desired to get the sample of article of food kept by the Local Health Authority analysed by the Central Food Laboratory. The Court had accordingly, required the Local Health Authority to forward one of the parts kept by the said Authority to the Central Food Laboratory. One of the parts was, therefore, sent by the Local Health Authority to the Central Food Laboratory for analysis. The report of Central Food Laboratory indicated that the sample was not conforming to the standards of mixed milk prescribed in the Table given blow Item No.11.01.11 of the Rules. According to the said report, milk fat and milk solid non-fats were less than the minimum prescribed limits. It was opined by the Central Food Laboratory that the sample was adulterated. Thereafter testimony of Food Inspector Mr.J.G.Mithavala, was recorded as PW.1 at Exh.18. During recording of his testimony, the Food Inspector had produced documentary evidence. He was also cross-examined on behalf of the respondents. The sworn testimony of the Food Inspector prima-facie established commission of offences by the respondents punishable under the provisions of the Act. Therefore, the learned Chief Judicial Magistrate, Bharuch had framed charge against the respondents at Exh.39. The charge was read over and explained to the respondents, who had pleaded not guilty to the same and claimed to be tried. Therefore, testimony of panch witness Diptesh Kishorchandra Shah was recorded as PW.1 at Exh.43; whereas testimony of helper Rameshchandra Parshotamdas Rana, who had accompanied the Food Inspector to the shop of the respondents, was recorded as PW.2 at Exh.44. After recording of evidence of the complainant and his witnesses was over, the learned Magistrate had explained to the respondents the circumstances appearing against them in the evidence of the witnesses, and recorded their further statements as required by Section 313 of the Code of Criminal Procedure. In their further statements, case of the respondents was that they were innocent and a false case was filed against them. However, none of the respondents had examined himself on oath, nor any witness was examined to substantiate the defence pleaded in their further statements. The respondents had submitted written arguments for consideration of the Court at Exhs. 46 & 47.

3. On appreciation of evidence adduced by the

complainant, the learned Magistrate held that the evidence established that the seals, which were applied by the Food Inspector on the bottles, were not legible, which was a serious flaw in the prosecution case. According to the learned Magistrate, the Food Inspector had not mentioned the provisions of law under which the offences were allegedly committed by the respondents, in the application which was submitted by him for obtaining written consent and, therefore, written consent granted was invalid. What was noticed by the learned Magistrate was that it could not be proved by the complainant that he had taken sample of milk in clean and dry bottles and, therefore, contravention of provisions contained in Rule 14 of the Rules was evident. It was also noticed by the learned Magistrate that the Food Inspector had failed to maintain a record of all proceedings relevant to taking of sample etc. as required by Rule 9(e) of the Rules and, therefore, the respondents were entitled to benefit of doubt. According to the learned Magistrate, the Food Inspector had not taken sample of milk which was homogeneous and representative in character and, therefore, the prosecution was liable to fail. In view of abovereferredto conclusions, the learned Magistrate has acquitted the respondents by judgment dated December 29, 1995, giving rise to instant appeal.

4. Mr.Sudhansu S. Patel, learned A.P.P. for the State, contended that the evidence on record establishes that the seals applied on the sample-bottles were tallying with specimen seal and signature separately sent to the public analyst as well as Central Food Laboratory and as they were found to be the same and intact the learned Magistrate was not justified in coming to the conclusion that the seals applied on the sample-bottles were not legible. According to the learned A.P.P. it is not the requirement of law that while making application for obtaining written consent of the competent authority, Food Inspector must specify the provisions under which the alleged offences were committed and absence of such specification in application seeking written consent would not invalidate written consent which is otherwise legal and valid. What was asserted by the learned counsel of the State Government was that the sworn testimony of Food Inspector which is supported by the testimony of his helper Mr.Rana establishes beyond reasonable doubt that the sample was divided and placed in clean and dry bottles, as a result of which the finding recorded by the learned Magistrate to the effect that the provisions of Rule 14 of the Rules were not complied with is liable to be set aside. After referring to the evidence on record, it was argued by the learned

counsel of the appellant that the evidence on record does not establish that the provisions of Rule 9(e) of the Rules were not complied with and, therefore, the said finding was also liable to be set aside. According to the learned counsel of the State Government, the sample was homogeneous in nature which is quite evident from the evidence of Food Inspector and, therefore, no benefit of doubt should have been given to the respondents on the specious plea that the sample taken was not homogeneous. It was emphasised by the learned counsel that the learned Magistrate has failed to appreciate the facts in their proper perspective and, therefore, the appeal should be accepted.

5. Ms.Kiran Pande, learned advocate appearing for Mr.B.S.Patel, learned advocate of the respondents on record, pleaded that finding recorded by the learned Magistrate that the bottles used for placing divided sample were not clean and dry is borne out from the testimony of the complainant as well as that of the helper of the complainant and, therefore, the said finding should not be regarded as erroneous one. According to the learned counsel of the respondents, it could not be established by the complainant that the seals applied by him on the sample-bottles were legible or that he had complied with the requirements of Rule 9(e) of the Rules and, therefore, the judgment impugned in the appeal should be upheld. What was stressed by the learned counsel of the respondents was that neither the testimony of Food Inspector nor that of his helper satisfactorily establishes that the sample purchased was homogeneous in nature and, therefore, well-reasoned acquittal of the respondents should not be interfered with in instant appeal. It was also argued that the written consent given by the competent authority stands vitiated for the reasons assigned by the learned Magistrate in the impugned judgment and, therefore, the appeal should be dismissed.

6. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. So far as finding of the learned Magistrate that seals applied on the sample-bottles were not legible is concerned, this Court finds that after institution of prosecution, the respondents had desired that one of the sample-bottles in possession of Local Health Authority be forwarded to Central Food Laboratory for analysis by submitting an application dated November 2, 1993. Thereupon the learned Magistrate had directed the Local Health

Authority to take appropriate steps for the purpose of sending one of the parts to the Central Food Laboratory, Gaziabad for analysis. On service of direction given by the learned Magistrate, the Local Health Authority had forwarded two parts of sample to the learned Chief Judicial Magistrate along with a forwarding letter dated November 10, 1993. The learned counsel of the respondents had thereafter submitted a purshis at Exh.6 stating, inter alia, that the seals on the outer cover of the sample bottles were proper and that the slip bearing signatures was also proper. Thereafter along with memorandum dated December 22, 1993, the learned Chief Judicial Magistrate, Bharuch had sent one of the sample bottles to the Director, Central Food Laboratory, Gaziabad (U.P.) in prescribed Form-I. A copy of memorandum and the specimen impression of the seal used to seal the container and the cover were sent separately by registered post. The report of the Central Food Laboratory, which is on record of the case at Exh.9, indicates that the seals on sample container were intact and had tallied with the specimen impression of seal given in Form VII which was enclosed. It also shows that seals (1) on the cover of Court, (2) on sample container as well as (3) on outer cover of sample parcel were also intact and had tallied with the specimen impression of seal given on copy of memorandum forwarded separately. Such a certificate could not have been issued if seals were not legible. It may be stated that in view of the proviso to sub-section(5) of Section 13 of the Act, document viz. a certificate signed by the Director of Central Food Laboratory has to be regarded as final and conclusive evidence of the facts stated therein. Therefore, the learned Magistrate was not justified in coming to the conclusion that seals, which were applied on the sample bottles, were not legible. The said finding is contrary to the evidence on record and is, therefore, hereby set aside. So also, the finding recorded by the learned Magistrate that written consent is invalid because the Food Inspector had failed to specify the provisions under which the offences were allegedly committed in the application seeking written consent, cannot be sustained. The application submitted by the Food Inspector to the competent authority for obtaining written consent to lodge prosecution is produced on record of the case at Exh.32. Therein it is specifically mentioned that the respondents had committed offences punishable under Sections 7(i) & 16(1)(a) of the Act. To say the least, the learned Magistrate has completely misread the application submitted by the Food Inspector for obtaining written consent. Therefore, the learned Magistrate was not justified in coming to the

conclusion that written consent on record was invalid. The said finding also being contrary to the weight of evidence on record, is hereby set aside. As far as finding recorded by the learned Magistrate regarding breach of provisions of Rule 9(e) of the Rules is concerned, this Court finds that there is nothing on record which would show that the Food Inspector had failed to maintain a record of all inspections made and actions taken by him in the performance of his duties, including the taking of samples and the seizure of stocks, and to submit copies of such record to the Health Officer or the Food (Health) Authority as directed in this behalf. It may be stated that it was never suggested to the Food Inspector during his cross-examination that he had failed to perform duties specified in Rule-9(e) of the Rules. The evidence on record establishes that no evidence could be led to establish that the Food Inspector had not performed the duties as contemplated by Rule-9(e) of the Rules, and had not submitted copies of record to the Health Officer or the Food Health Authority. In fact, non-performance of duties as contemplated by Section 9(e) of the Rules, was never subject matter of challenge during the course of recording of testimony of Food Inspector and, therefore, the learned Magistrate was not justified in holding that the Food Inspector had failed to perform duties as specified in Rule 9(e) of the Rules. The said finding is therefore, not based on evidence and is hereby reversed.

7. Ms.Kiran Pande, learned counsel of the respondents has vehemently contended that testimony of Food Inspector does not establish that the sample of milk for the purpose of analysis was divided and placed by the Food Inspector in clean and dry bottles and as breach of mandatory provisions of Rule 14 of the Rules was committed, acquittal of the respondents should be upheld by this Court. A bare perusal of the testimony of the Food Inspector makes it evident that he had taken the samples in clean and dry bottles. What is stated by this witness in his examination-in-chief is that he had taken samples in three bottles which were dry, free from moisture, clean, without colour, empty, transparent and odourless. In his cross-examination, the witness has stated that he had used the bottles in the same condition in which they were given to him from the office. It was also stated by him that he himself had not undertaken any procedure to clean or dry the bottles, but, it was asserted that the bottles used for taking samples were new and clean. It was also mentioned by the witness that he was not knowing as to how the bottles were cleansed and dried at his office. On reappreciation of evidence

of the Food Inspector, this Court is of the firm opinion that his testimony establishes that he had taken samples in three clean and dry bottles. The assertion made by the Food Inspector that he had taken samples in clean and dry bottles, gets ample corroboration from the testimony of witness Rameshchandra Rana examined at Exh.44. His evidence would show that he was discharging duties as helper in the Office of Assistant Commissioner of Food and Drugs and that he had accompanied the Food Inspector when the Food Inspector had gone to take sample of milk from the shop of the respondents. The witness has categorically stated that the samples were taken in the bottles which were clean. This assertion could not be shown to be untrue. Having regard to the nature of evidence adduced by the prosecution, this Court is of the opinion that the learned Magistrate was not justified in holding that the Food Inspector had committed breach of Rule 14 of the Rules and, therefore, the respondents were entitled to the benefit of reasonable doubt. Said finding is also found to be contrary to evidence on record and is therefore, set aside.

8. This bring the Court to consider the question whether the sample of milk, which was purchased by the Food Inspector, was homogeneous in nature. In his substantive evidence before the Court, the Food Inspector maintained that he had stirred the quantity of milk kept in the galvanized Can with the help of 1 litre measuring instrument kept in the Can in order to see that the sample purchased was homogeneous in character. However, this fact is not stated in the complaint which was lodged by him before the learned Magistrate. In the complaint detailed account of minutest fact is mentioned except this. If the Food Inspector had stirred milk as was claimed by him in his testimony, he would not have failed to mention the said fact in his detailed complaint. It is also relevant to notice that panch witness Diptesh K.Shah has not supported the prosecution nor proved the contents of panchnama. What is important to note is that the testimony of Rameshchandra Rana, who was helper and present all throughout when the sample of milk was purchased from the respondent No.1 does not establish that the quantity of milk kept in the Can was stirred and made homogeneous. This witness has not referredto the fact that the sample of milk which was purchased was made homogeneous. If the sample had been made homogeneous, this witness, who was present all throughout with the Food Inspector, would not have failed to mention the said relevant fact before the Court. Under the circumstances, the assertion made by the Food Inspector that he had stirred the quantity of milk to make it homogeneous does

not inspire confidence of this Court. It may be mentioned that this part of the evidence of the Food Inspector has not inspired confidence of the learned Magistrate, who had advantage of observing demeanour of the witnesses. The testimony of the Food Inspector further establishes that if the quantity of milk was not properly mixed up and sample was not homogeneous, it was likely to affect the result of its analysis. It is well settled that the sample of milk must be homogeneous and representative so that the analysis can furnish reliable proof of the nature and content of the article of food under the analysis. Thus, on reappreciation of evidence adduced by the complainant and his witness, this Court finds that the acquittal recorded by the learned Magistrate is not liable to be interfered with because it could not be established by the complainant that he had stirred and/or churned the quantity of milk kept in Can so as to mix up from top to bottom properly. Normally, in order to make the quantity of milk mix up properly, measuring instruments are not used, but special instruments available are being used. In view of this state of affairs, the appeal cannot be accepted and is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed.

(J.M.Panchal,J.)

(patel)